Filed 12/23/15 In re J.B. CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

| | |
|---|---|
| In re J.B. et al., Persons Coming Under the Juvenile Court Law.<br>_____<br>LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>N.B.,<br><br>Defendant and Appellant. | B262166<br><br>(Los Angeles County Super. Ct. No. CK06147) |

APPEAL from an order of the Superior Court of Los Angeles County, Julie Fox Blackshaw, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Appellant.

Mary C. Wickham, Interim County Counsel, Dawyn R. Harrison, Assistant County Counsel, Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

_____

N.B. (father) appeals from an order denying placement of four children with him and allowing only monitored visitation. We find no error and affirm.

## FACTUAL AND PROCEDURAL SUMMARY

In June 2014, the Department of Children and Family Services (DCFS) filed a Welfare and Institutions Code section 300 petition[1] on behalf of J.B. (born 2000), Y.B. (born 2002), Na.B. (born 2003), and Ny.B. (born 2005),[2] alleging physical abuse by the children's guardian, K.O. K.O. had been granted a probate guardianship in 2013, after the children's mother, D.S., lost her housing. On DCFS's petition, the children were detained from K.O. and placed in foster care.

In his initial interview with DCFS, father claimed he had attempted to challenge the guardianship before the dependency petition was filed. He accused K.O. of denying him access to his children; yet he also claimed K.O. had allowed J.B. to live with him in February or March 2014. Father admitted he could not handle J.B.'s behavioral problems while she stayed with him, and the girl went on to stay with other relatives. Father denied knowing K.O. hit the children or seeing marks on their bodies, but he reported J.B. had told him K.O. had "popped her."

K.O. moved to terminate the guardianship. In October 2014, the court sustained a new count alleging a conflict had arisen between the children and K.O., struck the remaining counts, and granted her motion. The court took jurisdiction over the children and ordered them suitably placed. It directed DCFS to assess the parents for placement and invited them to file section 388 petitions.

Subsequently mother and father filed separate section 388 petitions, seeking placement of the children. In the alternative, father requested unmonitored visits and reunification services. Both parents relied on a 2011 custody order, granting mother sole

---

[1] Statutory references are to the Welfare and Institutions Code.

[2] The petition also included a half-sibling, J.S., who is not subject to this appeal.

custody and granting father one unmonitored or overnight visit per month.[3] Based on their criminal history and a recent report by a paternal aunt, DCFS filed a subsequent petition under section 342, alleging the parents had a history of substance abuse and were currently using Phencyclidine (PCP).

When assessing father's home in December 2014, the social worker noted a strong marijuana odor in one of the bedrooms. Father denied drug use but said his brother, who frequently visited, might have been smoking marijuana. Father worked at the post office and planned to have his female companion look after the children whenever he worked overnight. The female companion self-reported having a criminal history and prior involvement with DCFS. Mother reported father and his companion used cocaine. Mother also claimed father had not helped her when the children were in her custody.

DCFS encouraged father to set up visitation with the children, but he did not. J.B. frequently ran away from her placement, engaged in high risk behavior, and used drugs. Y.B. and Na.B's foster mother reported that she had talked to the parents over the phone once or twice. She complained they had not called the boys for Christmas, and father had confused his sons' birthdays. The boys had behavioral problems, which the foster mother could not manage, and she believed they needed intensive services.

The court held a combined hearing on the pending petitions on January 28-29, 2015. It found father to be the presumed father of J.B., Y.B., Na.B., and Ny.B. The social worker testified father had tested negative for drugs on one occasion. She did not know if father tested for his work, and she acknowledged she did not have evidence he currently used PCP. A pre-employment drug screening form from October 2014 and

[3] Mother has an extensive dependency history involving these and other children. As relevant here, a 2005 petition alleged that father and mother had a physical altercation in front of the children, father kicked in the back door of the family's home, pushed mother, and brandished a gun; he also allegedly struck one of mother's older children with a belt. The case was closed in 2011, with the children returned to mother's sole custody. The custody order gave father a minimum of one unmonitored or overnight visit a month.

father's 2014 W-2 form from the United States Postal Service were admitted into evidence.

The court dismissed DCFS's section 342 petition. It granted the parents' section 388 petition to the extent the termination of the guardianship presented a change of circumstances, but found that placing the children with either parent would be detrimental under section 361.2. The court was concerned about father's long substance abuse history and the report that his home smelled of marijuana. Based on father's self-reported attempt to have the guardianship revoked, the court opined that father "had some awareness of what was going on" in the guardian's home. The court also noted that father only had "sporadic contact with the children" while they lived with the guardian. The court granted reunification services to father over his objection, and ordered three hours a week of monitored visitation.

This appeal followed.

## DISCUSSION

A child removed from the custody of a parent or guardian must be placed with a noncustodial parent if one is available and requests custody, unless the juvenile court concludes that the placement "would be detrimental to the safety, protection, or physical or emotional well-being of the child." (§ 361.2, subd. (a).) The juvenile court must weigh all relevant factors and must make the detriment finding by clear and convincing evidence. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1425–1426.) "We review the record in the light most favorable to the court's order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that placement would be detrimental to the child. Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]" (*In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1262.) We review the correctness of the court's ruling, not its reasoning. (*In re A.J.* (2013) 214 Cal.App.4th 525, 538.)

Applying that standard of review, we find substantial evidence to support the order. The court was concerned about father's long history of substance abuse, the smell of marijuana in his home, his sporadic visitation with the children, and failure to protect them during the guardianship.

Father argues he is a nonoffending parent because the court did not sustain DCFS's section 342 petition and there is no evidence he currently uses drugs. While there is a split of authority whether section 361.2, subdivision (a) applies only to nonoffending noncustodial parents (see e.g. *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 300–303 [§ 361.2 does not exclude offending parents, but all relevant facts may be considered as part of detriment determination]; but see *In re A.A.* (2012) 203 Cal.App.4th 597, 608 [offending noncustodial parent is not entitled to consideration under § 361.2]), there is no authority that a noncustodial parent must affirmatively be found to be offending in order to be denied custody. Moreover, the allegations in the section 342 petition concerned specifically the parents' abuse of PCP. The court's dismissal of the petition means only that the court found insufficient evidence of father's current use of PCP. It does not negate the evidence supporting the court's concern about probable detriment to the children from drug use in father's home. That evidence consisted of father's long substance abuse history, as contrasted with his relatively recent employment history with required drug testing, his nonchalant attitude towards marijuana use in the home, and his admitted need to leave the children in the care of others while he worked overnight. (See, e.g., *In re J.C.* (2014) 233 Cal.App.4th 1, 7 [long substance abuse history outweighs relatively short sobriety]; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 452 [secondhand marijuana smoke poses risk to children]; *In re Rocco M.* (1991) 1 Cal.App.4th 814, 826 [presence and accessibility of drugs may create substantial risk of serious physical harm to children].)

There also is evidence in the record that father has not been present in the children's lives and that he is unable to meet their special needs. Mother complained father had not helped while the children were in her custody. While father blames K.O. for his failure to visit the children during the probate guardianship, on appeal we draw

inferences in favor of the court order, not in father's favor; nor is there evidence that father visited the children after they were detained from K.O. The record indicates the children have behavioral problems, and father himself admitted he could not handle J.B's behavior. His plan to leave the children overnight with his female companion who self-reported having a criminal history and prior involvement with DCFS also is a cause for concern.

Father claims his "alleged lack of a relationship" with the children "is not, by itself, sufficient to support a finding of detriment for purposes of section 361.2, subdivision (a)." (*In re Abram L.* (2013) 219 Cal.App.4th 452, 464; see also *In re John M.* (2006) 141 Cal.App.4th 1564, 1571.) The cases on which father relies are distinguishable. The father in *In re John M.* had resumed contact with his child a year before the dependency proceeding; the court found the previous lack of contact was not the father's fault, and there was no clear evidence the father could not meet the child's special needs. (*Ibid*.) In *In re Abram L.*, the children had visited with the father "every other Saturday for many years." (*Id*. at p. 464.) In contrast, here, the record indicates father did not visit the children during the guardianship and did not set up a visitation schedule during the dependency proceeding. There also was evidence he could not handle his oldest daughter's behavioral problems in the short amount of time she stayed with him.

Father challenges the order of monitored visitation, arguing it is in the best interest of the children to visit with him as much as possible in an unsupervised setting. A visitation order is reviewed for abuse of discretion and may not be reversed unless it is arbitrary, capricious, or patently absurd. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.) Considering the lack of evidence that father visited the children at all, we cannot say that the order of three hours of monitored visitation a week restricted any established

contact. Nor is the court's caution in ordering monitored visits patently unreasonable in light of the children's behavioral problems, the lack of evidence of father's prior involvement in the children's lives, and the court's concerns about the safety of father's home.

## DISPOSITION

The order is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.